In The

Supreme Court of the United States

October Term, 1977

NO. 77-523

GWENDY WILSON, Administratrix of the Estate of Gary Wilson, Deceased, and Gwendy Wilson, Individually and as Widow of Gary Wilson, Deceased,

Petitioner,

vs.

CROUSE-HINDS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on April 19, 1977, revised on Petition for Rehearing En Banc June 29, 1977 and amended on Denial of Rehearing and Rehearing En Banc July 27, 1977.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 556 F. 2d 870 and is included herein as Appendices A, B, and C.

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JURISDICTION

The first opinion of the Court of Appeals for the Eighth Circuit was filed on April 19, 1977. Judgment in accordance therewith granting the plaintiff-appellant (petitioner herein) a new trial was also entered on that date. The court's second opinion and new judgment, following timely petition for rehearing *en banc*, revoking the grant of a new trial and affirming the trial court's judgment for the defendant were filed and entered on June 29, 1977. Following the timely filing of a petition for rehearing with an en banc suggestion by plaintiff, an order amending the wording of the court's June 29th opinion and an order denying plaintiff's petition for rehearing were entered on July 27, 1977. The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a party voluntarily dismissing a count, but not all counts, under a single cause of action is required to seek permission of the trial court either under Rule 15 (a) dealing with the filing of an amendment to pleadings, or under Rule 41 (a) dealing with voluntary dismissal of

an action, as held in this case by the Eighth Circuit Court of Appeals, or whether such party is entitled to dismiss such count as a matter of right and without seeking permission of the court as held by this Honorable Court in Hughes v. Moore, 7 Crouch 176, 3 L. Ed. 307, 11 U. S. 176.

This is a product liability action brought by the petitioner seeking damages for the wrongful death of her husband caused by a defective electrical plug manufactured by the defendant.

In the course of the trial plaintiff filed a voluntary dismissal of Counts I and II of her three-count petition. The dismissed counts dealt with negligence and warranty claims. The plaintiff elected to proceed solely on the third count dealing with strict liability only. The defendant and the trial court raised no objection to such voluntary dismissal by plaintiff. Subsequent to said dismissals, defendant continued to offer evidence of contributory negligence by decedent and his employer. Plaintiff objected to such evidence on the grounds that it was not material to any issue then in the lawsuit. Her objections were overruled.

On appeal, the Eighth Circuit, *sua sponte,* held that while it "would seriously question the admission of this evidence under the theory of strict liability" since plaintiff did not proceed under either Fed. R. Civ. P. 15(a), dealing with amendments, or Rule 41(a), dealing with dismissal of an *action,* in dismissing her negligence and warranty *counts,* such dismissals were ineffective and evidence of contributory negligence continued to be properly admissible. Petitioner contests that ruling as being in

direct conflict with the decision of this court in *Hughes v. Moore* (supra).

2. Whether a circuit court may in the absence of strong evidentiary justification grant a rehearing en banc and without reargument or rebriefing reverse a ruling of a three-man panel of said court on a finding of fact which does not involve a question of exceptional importance and reconsideration of which is not necessary to secure or maintain uniformity of its decisions.

The Circuit Court issued three successive opinions in this case. The first by a three judge panel, dated April 19, 1977, in reversing a defendant's verdict for instructional error, held that plaintiff had "sufficiently called attention" of the trial court to the problem of contributory negligence, first as embodied in an instruction given on the subject of improper maintenance (Appendix A p. 7) and, secondly, in an instruction requested but not given on the subject of foreseeability, and further held that the court had a duty to give a proper instruction on the point (Appendix A p. 10). The opinion pointed out that "although the court thereafter made several specific changes at plaintiff's request, plaintiff's counsel respectfully told the court that his suggestions 'won't cure it completely'" (Appendix A p. 7). Following a petition for rehearing and response thereto the entire court sitting *en banc*, but without reargument, held that at the conclusion of the conference on instructions plaintiff's counsel "stated that the instructions would 'satisfy us'" (Appendix B, p. 2). In fact plaintiff's counsel made no such statement but

rather, following the trial court's agreement to remove an objected-to instruction on hypothetical questions counsel specifically stated "*That* would satisfy us." (Appendix D p. 7).

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STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. Rule 15 (a).

Rule 15. AMENDED AND SUPPLEMENTAL PLEADINGS.

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Fed. R. Civ. P. Rule 41 (a).

Rule 41. DISMISSAL OF ACTIONS.

(a) *Voluntary Dismissal: Effect Thereof.*

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23 (e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a

notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless a counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. App. P. Rule 35.

Rule 35. DETERMINATION OF CAUSES BY THE COURT EN BANC.

(a) *When Hearing or Rehearing En Banc Will Be Ordered.*

A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

STATEMENT OF THE CASE

1. **Proceedings in the Trial Court.** Gary Wilson, a college student, was working nights at the Griffin Pipe Company in Council Bluffs, Iowa. He was killed. His death was caused by an electrical short in a plug manufactured by the defendant (a New York corporation) and attached to an electric welder. His widow, Gwendy Wilson, an Iowa resident, brought this action as co-administratrix of his estate, in the interest of herself and their infant daughter, born a month after his death. It was brought as a diversity action for an amount exceeding $10,000 in the United States District Court for the Southern District of Iowa. Plaintiff's theory of defendant's liability was that the electrical plug manufactured by the defendant was defectively designed in that the "gland nut clamping screw" intended to prevent torsional stress from being transmitted by a twisting of the cable into the interior of the plug, would not perform its function. Such failure permitted the ground wire to be twisted loose from its terminal within the plug and to come into contact with a live component also within the plug. This caused the grounded frame of the equipment to which the plug was attached to become electrically charged. Gary Wilson was killed when he touched it.

Plaintiff's petition embodied a single cause of action based on three counts: I. negligence, II. warranty, and III. strict liability, but plaintiff's evidence bore solely on the strict liability claim. Midway through the trial, plaintiff voluntarily filed a dismissal of her counts of negligence and warranty and elected to proceed solely on the

grounds of strict liability. Under Iowa law, contributory negligence is not a defense to a charge based on strict liability (Appendix A pp. 5, 8). After her dismissal of all but the strict liability count, plaintiff objected to the admission of evidence of contributory negligence offered by the defendant. Such evidence, that plaintiff's decedent moved the welder while it was attached to an electrical outlet and that decedent's employer did not maintain equipment in first class condition, was repeatedly admitted over plaintiff's objection.

Persuasive evidence that the subject plug was defectively designed was elicited from the *defendant's* own expert witness:

> "Q. No. I mean do you know why it doesn't function properly?
>
> A. Oh, yes, I do.
>
> Q. All right. Why don't you tell the ladies and gentlemen of the jury why?
>
> A. Well, when you assemble one of these plugs and you tighten up the nut, you get down to the point where you have this thing tight and then you tighten up the side locking screw, the purpose of which is to prevent torsional twisting, and so (Page 332) you tighten that up (the witness tightened the demonstration plug "locking screw" with a screwdriver as he spoke) and then—okay —then you twist it, and *it twists,* and so *it is not locking—it is not locking in position,* and when you assemble that, you know that, *so it is not operating properly.* Why, I don't know. It needs to be replaced."

At the conference in the trial court's chambers on the court's intended instructions plaintiff objected to one

instruction on the grounds that it "actually requires the plaintiff to prove freedom from contributory negligence or freedom from negligence on the part of Griffin Pipe (decedent's employer), which is not an issue in this case because we are under strict liability." The instruction, with certain minimal changes in the wording, which plaintiff asked "at least" be made, was given. Plaintiff requested an instruction that foreseeable misuse was not a defense to a charge of defective design. It was not given.

A jury verdict was rendered in favor of the defendant and Mrs. Wilson, the plaintiff, appealed.

2. **Proceedings in the Court of Appeals.** The court of appeals raised the question of the inadequacy of plaintiff's unilateral dismissal of counts I and II of her petition *sua sponte.* Defendant did not challenge the effectiveness of it in its brief or its oral argument. The appellate court, however, treated the dismissal of some but not all of the separate counts of a multi-count petition as the dismissal of an "action" under Fed. R. Civ. P. 41 (a) or as an "amendment" under Rule 15 (a) and stated that "A unilateral dismissal or amendment cannot be accomplished under either rule after an answer has been filed." The court thus held there was no effective dismissal of the negligence and warranty counts. It therefore found no prejudicial error in the admission of the evidence of contributory negligence, although it indicated it would "seriously question the admission of this evidence under the theory of strict liability" (Appendix A p. 5). On the subject of instructions, however, the court stated, "It is readily evident that the court's instruction erroneously informed the jury that plaintiff could not recover in strict liability if the de-

cedent or his employer failed to exercise reasonable care to maintain the machine. . . . The prejudicial error in giving instruction number 11 becomes exaggerated by the absence of an instruction which would have informed the jury that the plaintiff's recovery was not barred by decedent's or any other employee's failure to use reasonable measures to inspect the product or guard against a possible defect. (Appendix A p. 9). . . . We note that the trial court refused to give plaintiff's requested instruction No. 6 relating to foreseeable use. . . . Under strict liability and the circumstances of this case, an instruction on foreseeable use would seem essential." (Appendix A pp. 9, 10). The circuit court panel thus reversed the district court judgment and remanded the cause for a new trial stating, "We are convinced after a thorough study of the record that plaintiff did not have the theory of her case properly submitted to the jury." (Appendix A p. 10).

Defendant filed a petition for rehearing *en banc* to which plaintiff responded. Defendant replied. Plaintiff's motion for leave to rejoin was denied, following which the eight-man circuit court sitting *en banc* and without reargument ruled that:

> "Since a majority of the active judges have voted for a rehearing en banc, the court now vacates part III of the panel opinion and upon reconsideration finds that the judgment for defendant should be affirmed.
>
> "After a careful review of the entire record, the court finds that plaintiff failed to preserve as error that portion of instruction number 11 concerning 'improper maintenance.' Although plaintiff's counsel objected to several portions of instruction number 11, counsel did not specifically object to the 'improper maintenance' language. After the trial court adopted several of counsel's suggestions, plaintiff's counsel

> stated that the instructions would 'satisfy us.'" (Appendix B pp. 1, 2).

The court further stated in its amended opinion that:

> ". . . it is not clear that counsel specified that the court was committing error in failing to instruct in accordance with any of the principles of law contained in plaintiff's requested instruction. In any event, counsel's acquiescence in the instructions at the close of the conference precludes our consideration of the alleged error." (Appendix B pp. 2, 3).

The court vacated part III of its prior opinion granting the plaintiff a new trial and affirmed judgment for the defendant. Plaintiff was thus effectively denied her new trial by the majority even though the three-judge panel had found "plaintiff did not have the theory of her case properly submitted to the jury" and no question of exceptional importance or threat of conflicting opinions between panels justified reconsideration by the entire court en banc.

Plaintiff then filed her petition for rehearing with an *en banc* suggestion, whereupon the circuit court *en banc* and again without oral reargument struck the last portion of its prior opinion quoted above substituting therefor the following: ". . . We do not feel that the court erred in failing to give requested instruction number 6." (Appendix C p. 2). No mention was made of the statement in the prior part III of the panel opinion that:

> "This court has also consistently held that the trial court has a duty to properly frame the instruction when the instruction would be beneficial to the jury's proper determination of the case (citations omitted). Under strict liability and the circumstances of this case an instruction on foreseeable use would seem essential." (Appendix A p. 10).

Plaintiff filed this petition for certiorari.

REASON FOR GRANTING THE WRIT

1. This case merits review by this court on certiorari because *the decision of the court of appeals,* that a plaintiff may not without leave of court or consent of the defendant, before verdict, discontinue a count in his declaration and waive the issues joined thereon, *is in direct conflict with the holding of the Supreme Court* in *Hughes v. Moore,* 11 U. S. 176, 3 L. Ed. 307, and misapplies Rule 15(a) and Rule 41(a), Fed. R. Civ. P. The question of what is the correct procedure to follow in the dismissal of a "count" as distinguished from an "action" is of major importance to all litigants.

2. This case merits review by this court on certiorari because *the decision of the court of appeals,* which deprives petitioner Gwendy Wilson of her right to "have the theory of her case properly submitted to the jury" *is such an unjust decision and so substantially departs from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.*

3. This case merits review by this court on certiorari because *the action of the majority of the active judges of the Eighth Circuit Court of Appeals* in voting for a rehearing *en banc exceeds the authority contemplated by Fed. R. App. P. Rule 35* and in effect impugns the previously assumed validity and finality of rulings by three-judge panels in cases where consideration by the full court is not necessary to secure or maintain uniformity of a circuit court's decisions and where the proceedings do not involve a question of exceptional importance. The question of whether circuit courts may so ignore Rule 35 and

in effect grant an intermediate appeal to unsuccessful parties in virtually all cases is of prime importance and interest to all litigants. While the circuit courts are historically granted the right to determine for themselves their own methods of dealing with rehearing requests, the question for this court is whether they must do so within the confines of Rule 35. It is an important question of Federal law which has not been, but should be, settled by this court.

ARGUMENT

I.

The ruling of the Court of Appeals of the Eighth Circuit is in direct conflict with the holding of this court and is in an area in which there exists confusion and disagreement among and between the circuits.

(a) The Circuit Courts disagree as to whether Rule 15(a) or 41(a) apply to the subject situation. The Court below held both apply. In fact the Rules are silent on the subject and, contrary to the holding of the Court below, neither apply.

The question as to how a litigant should proceed in voluntarily dismissing before a verdict one of several multiple counts under a single cause of action has not been ruled on by this court since adoption of the Federal Rules of Civil Procedure. Those rules do not prescribe any procedure in such circumstances and have resulted in disagreement among circuits as to how such dismissal should be accomplished. The question is important since litigants following the unchanged pronouncement of this court in

Hughes v. Moore, supra, may be denied their constitutional right to a fair trial.

The Eighth Circuit's opinion in this case cites Justice Blackmun's opinion as a circuit judge:

> "Although there exists some disagreement on whether a plaintiff must follow Fed. R. Civ. P. 15 (a) or 41 (a) when dismissing less than all of the claims involved in an action, this court in *Johnston v. Cartwright,* 355 F. 2d 32, 39 (8th Cir. 1966), recognized that the differences were more technical than substantial: '(I)t may not be material whether the court acts under Rule 15 (a) which relates to amendments . . . or Rule 41 (a) (2).' " (Appendix A6).

The cited opinion of *Johnston v. Cartwright* also recognizes a conflict between circuits on the subject:

> ". . . Defendants appear not to be arguing that Rule 41 (a) (2) is confined to a dismissal of an 'action', rather than of a claim or a cause of action, and is not to be utilized to effect dismissal of parties who are not misjoined. Some authority would support that argument, if it were made. *Harvey Aluminum, Inc. v. American Cyanamide Co.,* 203 F. 2d 105, 108 (2nd Cir. 1953), Cert. den. 345 U. S. 964, 73 S. Ct. 949, 97 L. Ed. 1383. See *Philip Carey Mfg. Co. v. Taylor,* 286 F. 2d 782, 785 (6th Cir. 1961), Cert. den. 366 U. S. 948, 81 S. Ct. 1903, 6 L. Ed. 2d 1242. See too Barron & Holtzoff, Federal Practice and Procedure, ¶ 911, pp. 102-03 (Rules Ed. 1961). We would be inclined to favor however, the liberality of the contrary view espoused in other cases and typified by Professor Moore as 'the better view.' 5 Moore's Federal Practice, Par. 41.06-1, p. 1087 (2 Ed. 1964); *Young v. Wilky Carrier Corp.,* 150 F. 2d 764 (3rd Cir. 1945), Cert. den. 326 U. S. 786, 66 S. Ct. 470, 90 L. Ed. 477, including Judge Goodrich's opinion in concurrence; *United States v. E. I. duPont De Nemours and Co.,* 13 F. R. D. 490, 494 (N. D. Ill. 1953); *Ferer v. Transworld Airlines, Inc.,* 22 F. R. D. 60, 63 (E. D. Ill. 1957), yet it may not be material whether the court acts under Rule 15 (a) which relates to amendments, or Rule 21 which concerns misjoinder, or Rule 41 (a) (2). See *Broadway and Ninety-Six Street Realty Corp. v. Loew's, Inc.,* 23 F. R. D. 9, 11 (S. D. N. Y. 1958); *Southern Elec. Generating Co. v. Allen Bradley Co.,* 30 F. R. D. 135 (S. D. N. Y. 1962)."

In *Johnston v. Cartwright,* however, the question dealt with the dismissal of a "party" rather than a "claim" (as distinguished from a cause of action). It is *not* authority for the Eighth Circuit's opinion in this case that:

> "A unilateral dismissal or amendment cannot be accomplished under either rule after an answer has been filed. Under Rule 41 (a) a stipulation signed by all of the parties or an order of the court is required for a dismissal after an answer is filed. Similarly, under Rule 15 (a) a party may amend after an answer only by leave of court or by written consent of the adverse party. In the present case, plaintiff did not obtain a stipulation, written consent or an order of dismissal from the court. Thus the record fails to disclose any proper dismissal of the negligence and implied warranty counts." (Appendix A pp. 6, 7).

No authority is cited for that statement. It is new law. There is no case precedent nor statutory law supporting it.

It is correct, as the court stated, that: "Under Rule 41 (a) a stipulation signed by all the parties or an order of the court is required for a dismissal after an answer is filed" but such requirement in Rule 41 (a) applies only to dismissal of a "cause of action" and not of a "claim" or "count."

As stated in the *Smith, Klein* case:

"The initial issue before us is whether Rule 41 is applicable to the present case. Both Rules 41 (a) (1) and 41 (a) (2) apply by their terms to dismissal of an 'action.' The reference to an 'action' in Rule 41 (a) contrasts with Rule 41 (b), which provides that 'a defendant may move for dismissal of an action *or of any claim* against him.' (emphasis supplied). The language of Rule 41 (b) is broader and more comprehensive than the parallel language in Rule 41 (a) (citing treatise). While the notes of the advisory committee do not discuss the question, it is reasonable to assume that the drafters of Rule 41 would have included similar language in Rule 41 (a), had they intended to have that rule cover dismissal by the plaintiff of less than all the claims against any defendant.

. . .

"A 'civil action,' or an 'action,' on the other hand, is a sum total of the claims which the parties assert against each other.

. . .

"The Federal Rules and the cases which construe them thus make a clear distinction between a *'claim'* and an *'action.'* Therefore, when Rule 41 (a) refers to *dismissal of an 'action'* there is no reason to suppose that the term is intended to *include the separate claims which make up an action.* When *dismissal of a claim* is intended, as in Rule 41 (b), that concept is spelled out in plain language.

"Although cited by neither party in this case, *Lyman v. United States,* 138 F. 2d 509 (1st Cir. 1943), Cert. den. 320 U. S. 800 (64 S. Ct. 429, 88 L. Ed. 483) (1944) supports the proposition that one or more claims may be dismissed under Rule 41 (a). That case was brought in the district court in 1938 and was appealed in 1942 (*United States v. Lyman,* 125 F. 2d 67 (1st Cir. 1942)) and in 1943 (*Lyman v. United States,* supra). The court of appeals in both opinions refers to the dismissal of a 'cause of action,' a phrase which is not found in the Federal Rules, and appears to equate a 'cause of action' with an 'action' referred to in Rule 41. While this is understandable in a case which arose just after the adoption of the Federal Rules of Procedure, the interpretation accepted by the Court of Appeals for the First Circuit is not in accord with the framework of the rules or with the subsequent case law (citing treatise at ¶ 2.06 (2), supra) hence we decline to follow it here. . . . Application of the rule should be limited to dismissal by the plaintiff of the entire action rather than one or more claims against the defendant."

Smith, Klein & French Laboratories v. A. H. Robins Co., (E. D. Pa. 1973) 61 F. R. D. 24, 28-30.

It is also correct, as the Eighth Circuit Court stated, that "under Rule 15 (a) a party may amend after an answer only by leave of court or by written consent of the adverse party." But obviously *a voluntary dismissal of an action is not an amendment. Were it so, there would exist no need for Rule 41 dealing with dismissals of actions. By the same token, neither is a voluntary dismissal of a mere claim an amendment.* Both are final actions taken with respect to a pleading. Rule 41 provides that the former can only be accomplished by leave of court. *It makes no such requirement respecting the latter.*

(b) The holding of the Court below is in direct conflict with the holding of this Court.

The rules being silent on the subject, the holding of this court, unchanged since pronounced by Chief Justice Marshall, applies:

"Swann and C. Simms, for the plaintiff in error, contended. 1. That the plaintiff had no right to discontinue as to the first count, and waive the issues on that count, without the leave of the court, or the assent of the defendant.

"March 7th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, as follows:—Much of the seeming intricacy of this cause will disappear, if we extricate the questions made by the pleadings before the court, from others which might greatly embarrass and perplex it.

"The declaration contains four counts. The first recites an original contract between Cleon Moore and John Darby, for the sale of certain lands, lying in Kentucky, and proceeds to recount in detail those transactions on which the action was founded. The other counts state, in different terms, the several *assumpsits,* which they allege to have been made.

"The defendants crave *oyer* of the written contract stated in the first count, and file several pleas to that count. They, then, without repeating the *oyer,* file similar pleas to the remaining counts. After taking issue on some of the pleas, and demurring to others, the plaintiff below discontinues his first count.

"By the counsel for Hughes, this has been considered as error. But the court can perceive no reason for this opinion. After this discontinuance, the parties are in precisely the same situation, as if all the issues, both of law and fact, which were joined upon that count, had been decided in favor of the defendant below. Such decision could not, in point of law, have affected the rights of the parties, under the issues joined on the remaining counts, and consequently, the discontinuance upon that count must leave those rights unimpaired. Whether this count remain in the declaration, or be stricken out of it, the right of the plaintiff in the circuit court, to recover on the other counts, will be precisely the same. The examination of this right must be conducted on the

same principles as if the declaration had never contained the first count.

"By the plaintiff in error, it is contended, that the *oyer,* which was prayed of the written contract alleged in the first count, spreads that contract on the record, and makes it a part of all his subsequent pleas. This is certainly true, with respect to all his subsequent pleas to that count, but not with respect to his pleas to the other counts. Different counts allege different contracts, and different *assumpsits.* It is upon this idea alone, that a verdict can be rendered for the plaintiff, on one count, and for the defendant on another. Now, the *oyer* of one contract cannot be the *oyer* of another contract, and cannot spread upon the record a contract supposed to be totally distinct from that which was read. The discontinuance of the first count produces no change in this respect, in the condition of the parties. Had it remained, it could have had no influence on the other counts, nor could the *oyer* of the written contract it stated, have transferred that contract to the other counts."

Hughes v. Moore, Crouch 176, 3 L. Ed. 307, 11 U. S. 176.

As stated more succinctly in the syllabus:

"A plaintiff may, before verdict, discontinue a count at his declaration, and waive the issues joined thereon."

* * *

That there is confusion and error among the circuits concerning the application of Rule 15 (a) or Rule 41 (a) to a plaintiff's voluntary dismissal of a count is apparent from the cases cited. Those holding 15 (a) applicable had valid reasons for rejecting 41 (a). Those

holding 41 (a) applicable had valid reasons for rejecting 15 (a). Thus *petitioner had valid reasons from both groups for rejecting both 15 (a) and 41 (a) and proceeding under the guidance of this court as expressed in Hughes v. Moore, supra.*

The circuit court erred when *sua sponte* it ruled petitioner's dismissal of counts I and II ineffective because not accompanied by written leave of court or written consent of defendant. The defendant did not ask nor argue for such ruling in its brief on appeal. The trial court assumed effective dismissal in drafting instructions. Actual consent of both court and defendant is apparent. The only suggestion that such consent need be in writing is contained in Rule 41 (a)—but Rule 41 (a) applies only to "actions" and not to "counts."

The effect of a reversal of the ruling of the Court of Appeals for the Eighth Circuit on this point would be threefold:

(1) To clarify an obviously confused area of the law for all litigants,

(2) To suggest needed modification of the rules to fill a void and make specific provision for voluntary dismissal of a "count" or "claim" if that is desired, and

(3) To grant petitioner a new trial on the basis of the improper admission over objection of evidence of contributory negligence.

II.

The action of the Eighth Circuit Court of Appeals is contrary to the provisions of Fed. R. App. P. Rule 35.

(a) En Banc hearings may not be indulged in merely to reverse a three judge panel when the question is neither of exceptional importance nor portends a conflict between panels of the Circuit.

The theory of the federal judicial system contemplates that for litigants there shall be a trial at the district court level with the right of review by a circuit court of appeals. Such "circuit courts" originally consisted of only three judges. When the circuit courts were enlarged, the three-judge panel remained as the forum in which most cases were heard. It is, for all practical purposes and with few exceptions, the court of last resort for most litigants. Provision was made, however, for rehearing of a cause by the entire circuit court sitting *en banc* "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." (Fed. R. App. P. Rule 35). It was not intended that unsuccessful litigants following a decision by a three-judge panel in cases not fulfilling either of those two prerequisites should have a further appeal to the full court.

Yet that is what took place in this case. The well-reasoned panel opinion granted petitioner a new trial on the basis of erroneous instructions. The panel found the error had been adequately called to the court's attention

and had not been waived (Appendix A p. 7). A majority of the eight-man full court sitting *en banc* and without reargument reversed the three-man panel on that point. No question of exceptional importance was involved. No conflicting opinions between panels in prior or subsequent cases was indicated. The majority simply disagreed with the panel and imposed on the panel its own judgment holding not that the instructions were free of error but merely that counsel waived the defects in the instructions. The majority did this without the benefit of oral argument on the subject. In effect, the unsuccessful respondent was granted an additional intermediate appeal to a "swollen court" and petitioner was denied an opportunity to argue her cause to that court. The words of Justice Jackson as expressed in an opinion of this court are applicable to this case:

> "The case before us presents interesting questions on which there appears no conflict between panels; in fact, it is so unique that it is without precedent and is likely to be without progeny. A rehearing before the entire circuit en banc would simply be an appeal from the three judge court to a swollen circuit court."
>
> *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U. S. 247 (1953).

———o———

CONCLUSION

1. It is important that this court review the Eighth Circuit decision on certiorari in order to settle the question of whether in dismissing a count a plaintiff should

proceed under Rule 15 (a), Rule 41 (a), or *Hughes v. Moore,* supra. It is important to Mrs. Wilson and to all litigants that the law of *Hughes v. Moore* not be changed in an *ex post facto* manner so as to permanently deprive her and them of their constitutional right to "have the theory of her (their) case properly submitted to the jury." (App. A p. 10). Petitioner submits that the law clearly expressed in *Hughes v. Moore,* supra, cannot be changed by innuendo, surmise, nor liberal interpretation of rules of procedure not designed to apply to the question in issue. There is a need for this court to protect individual litigants against such judicial rule making depriving them of their rights after the fact.

2. It is important that this court review the Eighth Circuit Court decision on certiorari because of the need to resolve the question of whether a full circuit court sitting *en banc* and without oral reargument may override a three-judge panel of said court merely on the grounds of an interpretation by the majority of a casual statement by counsel which was contrary to the meaning given such statement by counsel and by the three judges of the Circuit Court who heard the case argued.

* * *

The Eighth Circuit's opinion ruling that one must seek consent of the court or opposing counsel before dismissing a count is in direct conflict with the applicable decision of this court. In granting respondent's motion for reargument in the absence of a question of exceptional importance or a probable conflict between panels of the full court and ruling without argument, as it did, that counsel

had expressed satisfaction with and waived objection to instructions when in fact he had not (as previously found by a three-judge panel of that court) *the Eighth Circuit Court of Appeals far departed from the "accepted and usual course of judicial proceedings."*

Under Supreme Court Rule 19 each one of those actions by itself merits the attention of, and the exercise of its power of supervision by, this court. Together they call for the grant of the requested writ.

Respectfully submitted,

FRANCIS P. MATTHEWS of

MATTHEWS, KELLEY, CANNON
& CARPENTER, P.C.

318 South 19 Street
Omaha, Nebraska 68102

Attorneys for Plaintiff-Appellant

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

—o—

No. 76-1651

—o—

Gwendy Wilson, Administratrix of the Estate of Gary Wilson, deceased, and Gwendy Wilson, Individually and as Widow of Gary Wilson, deceased,

Appellant,

vs.

Crouse-Hinds Co.,

Appellee.

—o—

Appeal from the United States District Court for the Southern District of Iowa

—o—

Submitted: February 17, 1977

Filed: April 19, 1977

—o—

Before LAY and WEBSTER, Circuit Judges, and REGAN,* District Judge.

—o—

LAY, Circuit Judge.

Gwendy Wilson, widow of Gary Wilson and administratrix of his estate, appeals from a jury verdict rendered in favor of Crouse-Hinds Co. She brought this diversity action for the wrongful death of her husband,

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* John K. Regan, United States District Judge for the Eastern District of Missouri, sitting by designation.

who was fatally electrocuted on March 10, 1973, while attempting to move a portable welder at his place of work. Plaintiff alleged that the welder's electrical plug, manufactured by the defendant Crouse-Hinds Co., was defectively designed in that it failed to prevent the ground wire from coming into contact with a phase wire when placed under torsional stress, thus causing the frame of the welder to become electrically charged.

The plaintiff pleaded alternative theories of strict liability, implied warranty and negligence. At plaintiff's request the case was submitted to the jury solely on the theory of strict liability and the jury returned a verdict for the defendant, Crouse-Hinds. On appeal plaintiff asserts that the district court committed prejudicial error, first, by admitting evidence relating to the contributory negligence of decedent and negligence of his employer, Griffin Pipe Co., and second, in improperly instructing the jury on strict liability. We find that the district court erred in instructing the jury and remand the case for a new trial.

I.

At the time of decedent's electrocution, it was undisputed that the frame of the welder was electrically charged because the ground wire in the electrical plug came into contact with a phase wire. Plaintiff's engineering experts testified that the death of the decedent was caused because the gland nut on the plug was defective. The gland nut was an integral part of the plug; its alleged purpose was to prevent torsional twisting of wires. It is plaintiff's theory that the ground wire came loose

from its terminal inside the plug because of torsional twisting.[1] These witnesses also testified that the plug was defective because (1) it was not designed to prevent contact between the ground wire and a phase wire in the event the ground wire came loose from its terminal and (2) that the plug was so designed that the compression screws, the screws which secured the ground and phase wires inside their terminals, could be cross-threaded giving a false impression that the screws were tight.

The defense offered evidence that the plug was not defective and that the ground wire came loose because Griffin Pipe, decedent's employer, did not properly assemble or maintain the plug. Experts for Crouse-Hinds testified that the plug was certified by Underwriters Laboratories and had withstood severe force tests. The tests revealed that more than 1938 pounds of force was needed to *pull* the ground wire loose from its terminal and that more than 120 torque pounds of force was need to *twist* the ground wire out of its terminal. Defendant's experts testified that in their opinion the accident was caused because Griffin Pipe did not secure the ground wire in its terminal or failed to tighten the gland nut screws either when originally assembling the plug or after a maintenance check.[2]

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1 An expert witness for the plaintiff made a clear lucite facsimile of the plug body so that he could observe the ground wire being pulled from its terminal by torsional twisting.

2 As additional support of this theory the defendant introduced photographs of the plug taken shortly after the accident by O. S. H. A. The photographs revealed that the end

(Continued on next page)

On the first two days of trial the defendant brought out on cross-examination evidence of improper maintenance and use of the welder in that (1) neither the decedent nor his co-workers had checked to see if the welder was disconnected from the power source before attempting to move it; (2) the applicable standard of the American National Standards Institute (ANSI) requires the user to disconnect an electrical welder from the power source before moving the welder; (3) decedent's employer, Griffin Pipe, did not conduct safety meetings; and (4) evidence that the insulation on the welder's wires was worn exposing the copper conductor and that other worn spots were covered by tape. Defendant also urged at trial and reasserts here that:

> [W]hoever was maintaining this equipment simply made no attempt to determine whether all component parts of the Crouse-Hinds plug were properly assembled or tight. . . . The insides of the Crouse-Hinds plug were not readily discernible and it would take a screwdriver to check what the plug looked like on the inside. We submit that whoever looked at the welder could see that the cord attached to our plug should be either replaced or repaired. It was clear that whoever was responsible for maintenance did not maintain the outside of the cord, and a fair inference is that he also failed to maintain the inside of the plug.

(Continued from previous page)

of the ground wire was mushroom-shaped. An expert for the defendant testified that a ground wire pulled or twisted out of its terminal by force would be elongated and that such force would not produce a mushroom shape.

II.

Plaintiff asserts that the trial court erroneously admitted the aforementioned evidence of faulty maintenance. Plaintiff contends that this conduct is evidence relating to decedent's contributory negligence and the negligence of Griffin Pipe, which in Iowa is not a defense in strict liability in tort. *Hawkeye Security Ins. Co. v. Ford Motor Co.*, 199 N. W. 2d 273, 380 (Iowa 1972); Restatement (Second) of Torts § 402A, comment n (1965).

We would seriously question the admission of this evidence under the theory of strict liability.[3] However, plaintiff's argument overlooks that the case was also tried under her negligence count and the defendant's pleaded defense of contributory negligence. Plaintiff asserts, however, that the negligence count was voluntarily dismissed and that these issues were withdrawn from the case. We cannot agree.

Sometime during the second day of trial plaintiff filed in the office of the clerk of the district court a voluntary dismissal of her negligence and implied warranty counts. The record does not disclose whether the pleading was filed before trial commenced on the second day, during trial or at the close of the day. At the commencement of the proceedings on the third day plaintiff rested her case. No oral record was made then of the dismissal and the

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3 *See Horn v. General Motors Co.*, 131 Cal. Rptr. 78, 551 P. 2d 398 (1976) (en banc) (plaintiff's failure to use seat belts); *Eshbach v. W. T. Grant's & Co.*, 481 F. 2d 940 (3d Cir. 1973) (father's failure to supervise use of riding lawnmower by children). *Cf. Melia v. Ford Motor Co.*, 534 F. 2d 795, 800-02 (8th Cir. 1976) (failure to stop for red traffic light).

transcript does not affirmatively indicate when the trial court was informed of the dismissal. The defendant indicates that its counsel was informed of the dismissal by mail received on the morning of the third day of trial.[4]

Although there exists some disagreement on whether a plaintiff must follow Fed. R. Civ. P. 15 (a) or 41 (a) when dismissing less than all of the claims involved in an action,[5] this court in *Johnston v. Cartwright,* 355 F. 2d 32, 39 (8th Cir. 1966), recognized that the differences were more technical than substantial: "[I]t may not be material whether the court acts under Rule 15 (a) which relates to amendments . . . or Rule 41 (a) (2)." In this case the differences are not material as plaintiff failed to comply with either rule.

A unilateral dismissal or amendmeint cannot be accomplished under either rule after an answer has been filed. Under Rule 41 (a) a stipulation signed by all the parties or an order of the court is required for a dismissal after an answer is filed. Similarly under Rule 15 (a) a party may amend after an answer only by leave of court

4 On the third day of trial the defendant proceeded with its evidence. The defendant's witnesses testified about the ANSI standards and a photograph which showed that after the accident decedent's employer, Griffin Pipe, had placed a sign on the welder warning, "Pull switch and unplug after using and before moving." Plaintiff did not object to the evidence concerning the ANSI standard, but did object to the testimony about the sign and the exposed copper wires. The objections were overruled.

5 See 5 J. Moore, *Federal Practice* ¶ 41.06-1 (2d ed. 1964); 6 C. Wright & A. Miller, *Federal Practice and Procedure,* ¶ 1479 (1971).

or by written consent of the adverse party. In the present case, plaintiff did not obtain a stipulation, written consent or an order of dismissal from the court. Thus, the record fails to disclose any proper dismissal of the negligence and implied warranty counts.

We do surmise that the trial court was made aware of the plaintiff's dismissal sometime before instructing the jury. At least it may be said the trial court and the parties understood the case was to be submitted only upon the strict liability theory.

We thus find no prejudicial error in the admission of the evidence.

III.

Plaintiff urges that the trial court erroneously instructed the jury on strict liability. The central controversy is the propriety of the court's instruction on improper maintenance. Plaintiff asserts that the court's instruction No. 11 required her to prove that decedent and his employer did not negligently maintain the plug.[6]

6 Defendant contends that plaintiff did not specifically object to the language concerning improper maintenance. See Fed. R. Civ. P. 51. However, we feel the substance of plaintiff's initial exception to the whole instruction sufficiently called attention to the problem and was sufficient to preserve the question for review. Plaintiff initially objected stating that the instruction requires "the Plaintiff to prove freedom from contributory negligence or freedom from negligence on the part of Griffin Pipe, which is not an issue in this case because we are under strict liability." Although the court thereafter made several specific changes at plaintiff's request, plaintiff's counsel respectfully told the court that his "suggestions won't cure it completely."

The court instructed the jury that, "A manufacturer is also entitled to expect that *reasonable measures* will be taken to maintain its product in a proper condition, and the manufacturer is not liable for damages which result from *improper maintenance of the product. . . .*" (Emphasis added.) This instruction erroneously injected into the case a standard of due care to be exercised by the decedent and his employer. Under Iowa law failure of the parties to exercise due care is relevant to negligence, but is not germane to strict liability. Only when plaintiff's use (or misuse) of a product is not reasonably foreseeable or constitutes assumption of the risk, can plaintiff's recovery be barred in a strict liability case under Iowa law. *Hawkeye Security Ins. Co. v. Ford Motor Co., supra,* 199 N. W. 2d at 380-81. Strict liability focuses on whether the product is unreasonably dangerous, and not on the exercise of reasonable care by the parties. *Cf. Robbins v. Farmers Union Grain Terminal Ass'n,* No. 76-1413 (8th Cir., filed March 17, 1977); *Ault v. International Harvester Co.,* 13 Cal. 3d 1113, 117 Cal. Rptr. 812, 528 P. 2d 1148 (1974). This principle is not only true as it relates to the plaintiff's or defendant's conduct, but it necessarily applies as well to the conduct of others, such as plaintiff's co-employees. *See, e. g., Eshbach v. W. T. Grant's & Co.,* 481 F. 2d 940, 944-45 (4th Cir. 1973) (father's negligence not a defense); and *McGoldrick v. Porter Power Tools,* 34 Cal. App. 3d 885, 110 Cal. Rptr. 481 (1973) (employer's negligence not a defense).

In the present case defendant concedes that it did not assert misuse as a defense against plaintiff's strict liability count. In light of this admission, it is readily evident that the court's instruction erroneously informed

the jury that plaintiff could not recover in strict liability if the decedent or his employer failed to exercise reasonable care to maintain the machine. Defendant urges that the court's instruction regarding reasonable maintenance relates to proximate cause and is not necessarily related to the decedent's or any other employee's lack of due care. However, defendant's characterization of the instruction in terms of proximate cause is merely another word formulation of the impermissible defense of contributory negligence. If plaintiff is not barred from recovery by negligent acts she cannot be barred by relabeling the same conduct as a contributing cause of the accident. *See Horn v. General Motors Corp.,* 131 Cal. Rptr. 78, 551 P. 2d 398 (1976) (en banc). The prejudicial error in giving instruction No. 11 becomes exaggerated by the absence of an instruction which would have informed the jury that the plaintiff's recovery was not barred by decedent's or any other employee's failure to use reasonable measures to inspect the product or guard against a possible defect.[7]

We recognize, as the court instructed in No. 11, that the plaintiff must prove that at the time of the product's use it must be assembled and installed in the manner intended by the manufacturer. *Cf. Hales v. Green Colonial, Inc.,* 490 F. 2d 1015 (8th Cir. 1974). However, once plaintiff has demonstrated this, assuming proof of a defect, the defendant remains liable for injuries arising from any *foreseeable use or misuse* of the product.[8]

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7 Plaintiff requested such an instruction, but failed to object to the court's refusal to give it. Under these circumstances she cannot complain of this omission. Fed. R. Civ. P. 51.

8 We note that the trial court refused to give plaintiff's requested instruction No. 6 relating to foreseeable use, be-

(Continued on next page)

We conclude that the instructions on strict liability were misleading when considered with the overall evidence regarding the alleged improper maintenance including the failure of the decedent to disconnect the welder from the electrical power source.

IV.

We are always hesitant to require a retrial. The administration of justice is never served when this is required. On the other hand, we are convinced after a thorough study of the record that plaintiff did not have the theory of her case properly submitted to the jury.

The judgment is reversed and the cause remanded for a new trial.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Continued from previous page)

cause it was not entirely accurate. Plaintiff registered a proper exception. We recognize that it is the general rule that a trial court may refuse to give any instruction which is not entirely correct, however this court has also consistently held that the trial court has a duty to properly frame the instruction when the instruction would be beneficial to the jury's proper determination of the case. *Emery v. Northern Pac. R. R.*, 407 F. 2d 109, 112 n. 3 (8th Cir. 1969); *Chicago & N. W. Ry. v. Rieger*, 326 F. 2d 329, 334 (8th Cir.), *cert. denied*, 377 U. S. 917 (1964); *Chicago & N. W. Ry. v. Green*, 164 F. 2d 55 (8th Cir. 1947). *See also Chavez v. Sears, Roebuck & Co.*, 525 F. 2d 827, 830 (10th Cir. 1975); and *Honeycutt v. Aetna Ins. Co.*, 510 F. 2d 340, 349 n. 11 (7th Cir.), *cert. denied*, 421 U. S. 1011 (1975); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2552 (1971). Under strict liability and the circumstances of this case, an instruction on foreseeable use would seem essential.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

—o—

No. 76-1651

—o—

Gwendy Wilson, Administratrix of the Estate of Gary Wilson, deceased, and Gwendy Wilson, Individually and as Widow of Gary Wilson, deceased,

Appellant,

vs.

Crouse-Hinds Co.,

Appellee.

Appeal from the United States District Court
for the Southern District of Iowa.

—o—

Submitted: February 17, 1977
Filed: June 29, 1977

—o—

ON PETITION FOR REHEARING EN BANC

—o—

Before Gibson, Chief Judge, and Lay, Heaney, Bright, Ross, Stephenson, Webster and Henley, Circuit Judges, *en banc.*

—o—

LAY, Circuit Judge.

Since a majority of the active judges have voted for a rehearing en banc, the court now vacates Part III of the panel opinion and upon reconsideration finds that the judgment for defendant should be affirmed.

After a careful review of the entire record, the court finds that plaintiff failed to preserve as error that portion of instruction No. 11 concerning "improper maintenance."

Although plaintiff's counsel objected to several portions of instruction No. 11, counsel did not specifically object to the "improper maintenance" language. After the trial court adopted several of counsel's suggestions, plaintiff's counsel stated that the instructions would "satisfy us."

Under the circumstances we find that plaintiff has failed to comply with Fed. R. Civ. P. 51, which requires specific objections to jury instructions. Rule 51 requires an objection to be "sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer v. Hoffman,* 318 U. S. 109, 119 (1943). The purpose of the rule is to make certain that the trial court is adequately informed. In the present case, although there exists some ambiguity in the record as to plaintiff's intent, it is clear that plaintiff did not at any time make a precise objection to the language of instruction No. 11 concerning "improper maintenance." Further, when the instructions are considered as a whole, and in light of the suggestions made by counsel and adopted by the trial court, it is not clear that counsel specified that the court was committing error in failing to instruct in accordance with any of the principles of law contained in plaintiffs requested instruction. In any event, counsel's acquiescence in the instructions at the close of the conference precludes our consideration of the alleged error.

Part III of the panel opinion which granted plaintiff a new trial is vacated and the judgment for defendant is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

September Term, 1976

—o—

76-1651

—o—

Gwendy Wilson, Administratrix of the Estate of Gary Wilson, deceased, and Gwendy Wilson, individually and as widow of Gary Wilson, deceased,

Appellant,

vs.

Crouse-Hinds Company,

Appellee.

—o—

Appeal from the United States District Court
for the Southern District of Iowa

—o—

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

July 27, 1977

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

September Term, 1976

—o—

76-1651

—o—

Gwendy Wilson, Administratrix of the Estate of Gary Wilson, deceased, and Gwendy Wilson, Individually and as a Widow of Gary Wilson, deceased,

Appellant,

vs.

Crouse-Hinds Co.,

Appellee.

—o—

Appeal from the United States District Court
for the Southern District of Iowa

—o—

ON PETITION FOR REHEARING EN BANC

—o—

Before Gibson, Chief Judge, and Lay, Heaney, Bright, Ross, Stephenson, Webster, and Henley, Circuit Judges, *en banc.*

LAY, Circuit Judge.

The last two sentences of the next to last paragraph of the court's order of June 29, 1977 starting with the words "Further, when" and ending with the word "error" are deleted.

The following sentence is substituted "Further, when the instructions are considered as a whole, and in light of the suggestions made by counsel and adopted by the trial court, we do not feel that the court erred in failing to give requested Instruction No. 6."

July 27, 1977

APPENDIX D

EXCERPT FROM THE RECORD OF
CONFERENCE BETWEEN COURT AND COUNSEL
IN CHAMBERS CONCERNING INSTRUCTIONS

Thursday, April 29, 1976—9:00 A. M.

PROCEEDINGS

(The following proceedings were had in the absence of the jury.)

The Court: Let the record show the Court is now convened out of the presence of the jury; that the Court has submitted to counsel a proposed draft of instructions for their suggestions and exceptions, and the Court now recognizes the Plaintiff.

Mr. Pogge: Comes now the Plaintiff and objects to Instruction No. 5 which deals with the hypothetical question.

The Court: Well, I am not sure that you aren't right on that, so you might not have to object. I only stuck that in because I thought maybe somebody would be squealing about maybe there was—somebody did assume something.

Mr. Pogge: I feel it was not a hypothetical question.

The Court: I don't feel there are any hypotheticals and I have no question about it. Bill, do you have any question about it?

Mr. Brennan: No.

The Court: We will just take it out so you will have no exception. I just put it in in case you thought there was anybody that assumed anything. Very good. That exception is taken care of then.

Mr. Pogge: Next, the Plaintiff takes exception to (370) Instruction No. 9.

The Court: All right. Proceed.

Mr. Pogge: The Plaintiff feels that—and respectfully submits to the Court that the present Instruction No. 6 uses the term "the manufacturer is entitled to expect a normal use of is product," and that—

The Court: Wait a minute. That is a requested instruction.

Mr. Pogge: Yes, sir.

The Court: That is your requested Instruction No. 6.

Mr. Pogge: Yes, sir.

The Court: Wait a minute and let me see. Okay. All right. You say—now what are you saying?

Mr. Pogge: The Plaintiff feels that Instruction No. 9 should instruct the jury that concerning a use which is reasonably foreseeable by the manufacturer, and should also use the term of "normal use" there. We feel that the instruction limits the Plaintiff.

The Court: You don't think it is covered in other instructions?

Mr. Pogge: No, Your Honor, and in that regard I would like to continue on through to Instruction 11, which deals with the same—

The Court: Right.

Mr. Pogge: —matter and, there again, we feel that (371) the term "normal use" should be used and also "reasonably foreseeable by the manufacturer". I do not have time to really revise this terminology, but let me point out to the Court in Instruction 9, in the second paragraph, second sentence, it says "All that the manufacturer is required to do is to design a product which is free from defective and reasonably dangerous conditions." Then sentence three, "The manufacturer of a product placed on the market expects that such product will be used without"—so

forth and so forth. We feel that the jury should be instructed that—to use the terms there "normal use", and then continuing on in Instruction No. 12—and this is where we really perhaps make our greatest objection, Your Honor—the first sentence says "A manufacturer is entitled to expect the product will be used in a proper manner."

The Court: Well, that's normal use, isn't it?

Mr. Pogge: Well, we would rather use "normal use" than "proper manner". We may be quibbling on terms there, but this is what the Plaintiff feels.

Then we go to the third sentence:

"If the article requires assembly or installation by other than the manufacturer, the Plaintiff must prove that it was properly assembled and installed."

We respectfully submit to the Court that that instruction actually requires the Plaintiff to prove freedom from contributory negligence or freedom from negligence on the part (372) of Griffin Pipe, which is not an issue in this case because we are under strict liability.

The Court: I entertained some area as it related to that. I put that in—that instruction in with the idea because the—I do know it, in general, to be the law as it relates to certain situtions, but I do know it is a suggested instruction by the Defendant, but we always have this problem of a product—of the installation of the product, and I put it in there more under that basis than anything else. I may and I do entertain that objection very strongly, and I may make some changes in that.

Mr. Pogge: I have a suggestion, Your Honor. It won't cure it completely but if we would add the words "in a manner which the manufacturer might reasonably anticipate"—

The Court: I rather think that that is what the law is correctly stated. I do. I think that is a better statement of the law.

Mr. Matthews: And Mr. Pogge said to add those words, but at the same time to strike "must prove that it was assembled and installed in a manner"—

The Court: I understand what you are saying. I am inclined to agree with you on that. I know you cite your case but the—you cite a case, I think, on that?

Mr. Brennan: That's correct, Your Honor.

The Court: But that case is not really just exactly (373) parallel in substance with this. I think this is a little strong because I do think it gets into the area of the negligence angle rather than strict liability—I mean whether or not there is contributory negligence. I think there is some connotation there and, of course, in many of your requested instructions, to negligence, and they don't go to strict liability. That's one of the reasons why you don't have much success with many of your requested instructions, Mr. Brennan, but I am not strong—but I have no question about the last sentence in this thing, and I am going to do something about "wear and deterioration", because I have done this before in a number of cases, and this is the question of ancient use—ancient problem, and you are not going to get anywhere with that. You can make your objection, but it will be overruled.

Mr. Pogge: I do want to make an objection to the last sentence, and recommend to the Court respectfully that these words be added. The whole sentence is this:

"A manufacturer is also entitled to expect reasonable measures to be taken to maintain its product in a proper condition (and) the manufacturer is not liable for damages which result from improper maintenance of the product or from wear and deterioration of the product."

We submit that at least this wording should be added: "which would be reasonably expected by the user."

The Court: Well, I have no question about that. I (374) think that is inherent in this itself.

Mr. Pogge: Well, we feel it is limited there; that any wear and tear—"wear and deterioration of the product"—

The Court: I am assuming that that is inherent within what I have stated, but I have no problem about "reasonably expected". Now, if you will state the words you want there, I will add those.

Mr. Pogge: All right. "which would be reasonably expected by a user."

The Court: All right. Okay.

Mr. Pogge: Finally, Your Honor, then for the record, we would take exception that the Court did not include requested Instruction No. 6 of the Plaintiff.

The Court: Yes. All right.

Mr. Pogge: That is an instruction, Your Honor, that with due respect to the Court, was used by Judge . . . (Schatz) in Omaha in a Federal Court which was just affirmed by the Eighth Circuit.

The Court: Well, I can name you several where this was just affirmed too.

Mr. Pogge: I understand, Your Honor. Excuse me just a minute. I believe that's all.

The Court: Well, I think those are the areas that I expected you to have some question about, and I do entertain them with depth.

(Page 375) Mr. Pogge: Let the record show this is all the objections of the Plaintiff. We except to any of the—

The Court: I think what your desire is that in 9, that we go more—that you have the matter of foreseeability—let me see—I think what you want to add—it is the one that's—It's 9, Raymond?

Mr. Pogge: Yes. Somehow I missed 9 and 10 here somewhere.

The Court: I don't know. I want to think about that.

Mr. Pogge: Frank took it.

The Court: What is it you suggest I add to that —or subtract? I'm not going to give your No. 6— I mean I am not going to give your No. 6 so that's—

Mr. Pogge: Perhaps 9 would be all right if you correct 11. I think 11 is the main one.

The Court: That's what I think. I knew you talked in conjunction with 11. Now, what is it you want to put in 11?

Mr. Pogge: Let's go back to 11. I guess it is 12, Your Honor. Let's go to 12. 12 is the one where we object to the term "proper manner". We would suggest the wording of that first sentence be:

"The manufacturer is entitled to expect that his product will be used in a normal manner."

The Court: You want "normal" instead of "proper"?

Mr. Pogge: Yes, sir.

(Page 376) The Court: All right. I will substitute "normal". What else about that?

Mr. Pogge: And then in the third sentence, strike the words "properly assembled".

The Court: "Properly assembled"?

Mr. Pogge: Strike the word "properly".

The Court: And inject what?

Mr. Pogge: And then after "installed", add "in a manner which the manufacturer might reasonably anticipate", and then in the last sentence after the word "product", add these words: "which would be reasonably expected by the user."

The Court: I have no problem with those.

Mr. Brennan: Could I have him read back to me the words? "The Plaintiff must prove that it was assembled and installed in a manner"—

Mr. Pogge: —"which the manufacturer might reasonably anticipate."

The Court: I am willing to accept those changes.

Mr. Pogge: Fine.

The Court: So I don't know just exactly what it is now I haven't appeased you about.

Mr. Pogge: Then to take out the instruction on the hypothetical.

The Court: Yes. That goes out.

Mr. Pogge: That would satisfy us.

(Page 377) The Court: All exceptions except as I have indicated on the record will be changed as indicated. All other exceptions are overruled. I want to make the record.

Now, I will listen to you, Mr. Brennan.

* * *